United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2102

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ELIJAH EPHRAIM JMIRAD,

Petitioner-Appellant,

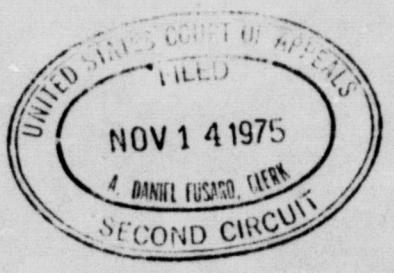
- against -

DOCKET NO. 75-2102

THOMAS E. FERRANDINA,
United States Marshal,
Southern District of New York,

Respondent-Appellee.

APPELLANT'S BRIEF



TENZER, GREENBLATT, FALLON & KAPLAN
COUNSELLORS AT LAW
100 PARK AVENUE, NEW YORK, N. Y. 10017

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Issues Presented for Review

In this international extradition proceeding brought by the Government of India, in which the appellant claimed, among other things, that extradition was barred by the Statute of Limitations, this Court reversed an order of the district court and remanded the proceedings for a finding as to whether the statute of limitations was tolled because the appellant left India with the intent to avoid prosecution. The proceedings on remand bring up for review the following questions:

1. Did the court below, having found that appellant did not leave India with the intent to avoid prosecution, exceed the mandate of this Court and violate the law of the case by making a finding with respect to the intention of the appellant subsequent to his having left India?
2. Was there any evidence to support the finding that subsequent to his having left India, appellant formed the intention not to return to India to avoid prosecution?
3. Was the Government of India obliged to prove the appellant's intent beyond a reasonable doubt?
4. Did the court below violate appellant's constitutional rights and commit reversible error by denying him the right of discovery and by permitting the introduction of hearsay evidence?
5. In a proceeding where the statute of limitations was

a critical element, did the court below commit irrevocable prejudice by a delay of fourteen months in deciding an application for a writ of habeas corpus?

6. Was the evidence of the alleged crime presented by the Government of India insufficient with respect to an essential allegation?

7. Was there sufficient evidence of political motivation so as to require the Government of India to rebut appellant's proof?

STATEMENT OF THE CASE

This is the second appeal from orders of the District Court in an international extradition proceeding commenced by the Government of India against appellant Elijah Ephraim Jhirad (hereinafter "Jhirad"), former Judge Advocate-General of the Indian Navy.

India initially sought extradition on 52 separate counts of embezzlement. The District Court, prior to the first appeal, found, ~~362 F. Supp. 1057 (S.D.N.Y. 1973)~~ 355 F. Supp. 1155 (S.D.N.Y. 1973), that 49 of the those counts were barred by the applicable statute of limitations (A18).* The first appeal, therefore, was concerned only with the three remaining counts in which Jhirad was charged with embezzlement of 29,000 rupees (or $3,422.00 at the current rate of exchange).**

Jhirad is sixty-two years of age. He is a permanent resident of the United States. He lives here with his wife and three children and is employed by a major law book publisher. For several years, he was the Senior Editor of the current revision of Benedict on Admiralty; he is presently the Managing Editor of the Banking Law Journal.

On the first appeal, Jhirad raised four issues for review: (1) Was extradition for the three remaining counts of India's charges barred by the passage of time? (2) Was the evidence presented by India to the U.S. Magistrate insufficient to establish probable cause with respect to an

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* Numbers refer to pages in the Appendix to appellant's Brief on Appeal.

** As will appear, as a result of subsequent proceedings below, the District Court has found that only two counts are not time-barred. These amount to 19,000 rupees, or $1,609.

essential element of the alleged crime? (3) Did Jhirad establish that extradition was being sought by India for a political motivation? and (4) Was there a treaty of extradition between the United States and India?

This Court found, in 486 F. 2d 442 (1973), that the British-American Treaty of 1931 was a valid extradition treaty between the United States and India. However, the Court did not reach the issues of probable cause or political motivation; rather it reversed the District Court's determination that extradition for the last three counts of India's charges was not time-barred and remanded the proceeding for a finding on that threshold issue: had Jhirad fled India with intent to avoid prosecution, thus tolling the running of the limitations statute? (A63 - A70)*

Following the remand, India requested the opportunity to offer additional evidence on the issue of intent; and a further hearing was ordered by the District Court before the magistrate who had conducted the initial extradition hearing. Jhirad thereupon moved to bar the taking of additional testimony or, in the alternative, for prehearing discovery. The District Court denied both applications. (A71 - A78)

The hearing on intent was held before the magistrate on January 30, 1974. During the course of the hearing, Jhirad argued that the magistrate had no power to determine the issue

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* Numbers refer to pages in the Appendix to the Brief on Appeal.

of intent since it related to jurisdiction. He also objected to the introduction of documents as being in violation of the standards set down in 28 U.S.C. 2246. Both of these objections were overruled (A83 - A86).

Jhirad further contended that India was required to prove the issue of intent beyond a reasonable doubt. The magistrate ruled that if the hearing had been a domestic prosecution, the Government would have been obliged to prove intent beyond a reasonable doubt, and that India had "failed in that regard". (A89 - A90)

The magistrate went on to hold that the issue should be determined by the "preponderance of the evidence" (A90). As to the issue of intent, the magistrate found that Jhirad "did not leave India for the immediate purpose of avoiding prosecution." (A91)

The magistrate then proceeded to find <u>against</u> Jhirad on an entirely different issue, an issue which was completely irrelevant to, and beyond the scope of, the mandate fixed by this Court in its remand to the District Court. The precise finding of the magistrate was as follows:

> "On all the evidence, I conclude that Jhirad left India for the primary and immediate purpose of attending a World Jewish Conference in Brussels." (A90)
>
> "I find it more likely than not that, although he [Jhirad] did not leave India to avoid prosecution, while away he decided not to return to India, since he feared being prosecuted." (A93)

The only evidence before the magistrate on the issue as to when Jhirad formed the intent not to return to India was that of Jhirad himself, who testified that his intention was formed in November or December of 1966 (A146), after his wife, whose health had deteriorated under the strain of years of surveillance and harassment, refused to go back (A136). There was not a scintilla of evidence to support the magistrate's guess that Jhirad's intention not to return was formed "in the middle of September 1966, and before the 25th and 27th days of that month." (A93) On the contrary, the uncontradicted evidence established that Jhirad lived openly in Geneva, with the knowledge of high Indian officials for a year following his departure from India (A 88; A 137-138).

[Although it is not clearly articulated in the decisions below, the magistrate's finding that Jhirad formed an intention not to return to India in the middle of September 1966 results in the elimination of one of the three remaining counts. The earliest of the three remaining counts is charged to have occurred on July 29, 1961. Since the magistrate found that the statute was tolled only in the middle of September 1966, more than five years had already passed with respect to this count. This reduces the extraditable charges against Jhirad to misappropriation of 19,000 rupees, or a grand total of $1,609.00.]*

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* The British-American Treaty of 1931 provides (Art. 7) that Jhirad may be tried in India only for those offenses which are extraditable (A 107).

The magistrate, therefore, found that the last two counts of embezzlement were not time-barred because the running of the statute, "in the middle of September, 1966", had been tolled. He held that "if he did not return to India, when he otherwise would have, so as to avoid prosecution, that would be a constructive flight." (A91) The magistrate cited no authority for this novel doctrine.

Jhirad thereupon applied for a third writ of habeas corpus in this proceeding on May 3, 1974.

The District Court did not decide that application until July 17, 1975 - that is, more than fourteen months after the application.

The District Court sustained the findings of the magistrate. The court suggested that "perhaps" it would have determined on the record that Jhirad formed the intent to flee prior to leaving India. (A98) The court, however, expressly concluded that "it is not my province to try the matter de novo". (A100) Instead, the District Court relied upon and reiterated the magistrate's view - again, without citation of authority - (a) that the statute of limitations could be tolled if Jhirad formed the intention not to return to India for the first time after he left and (b) that, in fact, Jhirad did form such an intention not to return prior to September 25 and 27, 1966 (A100 - A101).

The District Court also rejected - again, without any citation of authority - Jhirad's contention that India's obligation was to prove the issue of intent beyond a reasonable doubt. (A102 - A103)

The issues of law raised by the latest determinations in the District Court and the delay in determining Jhirad's application are not the only subjects of this appeal. The appeal also brings up for review the two issues left unresolved in the previous appeal. Because of this Court's remand on the threshold question of the statute-of-limitations issue, this Court did not reach issues raised relating to (a) the absence of proof of an essential element of the alleged crime and (b) the political motivation of the Government of India in seeking Jhirad's extradition.

The complaint against Jhirad is set forth in three separate "charge sheets" (indictments) alleging 52 separate counts of alleged embezzlement from a Naval Prize Fund (A152-A).

The format and the bulk of the substance in each of the charge sheets is identical. From them it appears that in 1948, Great Britain decided to make a grant from the proceeds of the naval prizes of war captured in World War II to an India-Pakistan Pool for distribution to the officers and men of its former Colony of India (now India and Pakistan) who had seen the requisite war service at sea. In 1956, India and

Pakistan issued a Joint Proclamation calling on potential claimants to "notify their claims in the manner prescribed." In 1958, following validation of the claims and their division as between India and Pakistan, the sum of 1,973,679 rupees was transferred to the Indian Navy for distribution. The Naval Prize Fund was designated as a non-public fund; and provision was made for the Fund to be administered by the then Chief of Naval Staff, Vice Admiral R.D. Katari, Commodore G.P. Kapoor, and Jhirad (then Judge-Advocate General of the Indian Navy). Withdrawals could be made from the Fund on the signature of any one of the three administrators, to be countersigned by a Staff Officer, P.L. Sharma, who was designated the Secretary of the Fund.

The charge sheets recite 52 separate counts in which it is alleged that Jhirad withdrew cash from the Fund and deposited the same or smaller sums in his personal account.

The charge sheets then, in each case, allege:

> "The investigation has further revealed that there were no withdrawals from the personal bank accounts of the accused for making the deposits mentioned...above."

Finally, in each case, it is charged:

> "Some of the Naval personnel who were entitled to a share of the Prize Money have, on being examined, stated that they did not receive their share of the Prize Money."

The evidence presented by the Government of India rested almost exclusively upon documents. In addition to those documents showing the establishment of the Fund and its administration, the Government produced ledger sheets showing certain cash withdrawals from the Naval Prize Fund and certain cash deposits in one of Jhirad's personal accounts.

The evidence established that, as Judge Advocate General of the Indian Navy, Jhirad was a civilian employee with the privilege of conducting his own law practice. Jhirad testified without contradiction that he had a substantial number of clients who customarily paid his fees in cash and that, in addition, he had income from securities transactions. (A 29 - A 30).

The evidence established that substantial cash transactions were necessary because many of the claimants were paid by postal money orders which could be purchased only with cash, and that, sometimes, Jhirad advanced cash for the purchase of money orders and then reimbursed himself from the Naval Prize Fund (A 29 - A 30).

The magistrate found at the initial extradition hearing that India had failed to make a prima facie case in the essential allegation that intended recipients of the Naval Prize Fund had not received their share (A 27). He nonetheless concluded that a prima facie case had been made sufficient to hold Jhirad for extradition.

On the issue of political persecution, Jhirad testified without contradiction that he had undergone considerable political harassment in India because of his strong and public pro-Israel position; that his telephone had been tapped; his mail examined; and that he had been warned by a colleague in the Navy that he was under surveillance by the Special Police Establishment for political offenses. (A 129 - 135)

POINT I

THE DISTRICT COURT EXCEEDED THE MANDATE OF THE COURT OF APPEALS AND VIOLATED THE LAW OF THE CASE.

The Supreme Court has said that the purpose of the statute of limitations is "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past." The purpose also is to encourage "law enforcement officials promptly to investigate suspected criminal activity". Toussie v. United States, 397 U.S. 112, 114 (1970).

For these reasons, the court held that "criminal limitations statutes are to be liberally interpreted in favor of repose." Toussie v. United States, supra.

This policy was expressly incorporated into the British-American Treaty of 1931 under which extradition is sought in this proceeding. The contracting powers not only provided that the expiration of the statute of limitations was a bar to extradition, but went further so as to give the accused the benefit of the more liberal statute which might be in existence in either country by allowing the accused to rely on the statute either of the country seeking extradition or of the country in which he is found. (Treaty, Article 5, A. 107)

Nonetheless, despite the policy explicitly

articulated by the Supreme Court in Toussie and the affirmation of that policy in the Treaty itself, the District Court and the magistrate have consistently, throughout this proceeding, given a narrow and restrictive interpretation of the statute of limitations, wholly inconsistent with the policy in favor of repose.

In the decision which led to Jhirad's first appeal to this Court, both the magistrate and the District Court, when confronted with a conflict of rulings within the circuits, chose that interpretation which severely limited the application of the statute of limitations. This Court reversed.

Again, on the remand, the court below violated the mandate of this Court, denied Jhirad an opportunity for discovery (Point II, infra) and applied a standard of proof (Point III, infra) the effect of which was to circumscribe narrowly respondent's rights. As a result, the statute of limitations was applied below with Draconian intent instead of with the liberal interpretation required by our law and the Treaty.

This Court remanded for one purpose only: for "a finding on the intent of the appellant in leaving India" (A68). The magistrate found it "more likely than not that [Jhirad] did not leave India to avoid prosecution" (A93). In view of the express direction of this Court, this was the

end of the matter, or it should have been. The running of the statute of limitations was not tolled - by the express finding of the magistrate - and Jhirad, therefore, must be discharged.

The magistrate, pressing to hold Jhirad for extradition, made a finding with respect to an entirely different issue. He found that, after Jhirad had been abroad for several months, he "decided not to return to India, since he feared being prosecuted." (A93)

The magistrate in reaching out for, and in making a determination with respect to, an issue which went beyond the scope of the remand, violated the law of the case.

In In re Sanford Fork & Tool Co., 160 U.S. 247, 255-256 (1895), the Supreme Court held:

> "When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided upon appeal; or intermeddle with it, further than to settle so much as has been remanded."

This rule, which applies to a mandate from the Supreme Court to a circuit court, applies as well on a remand from a circuit court to a district court. Munro v. Post,

102 F. 2d 686 (2d Cir. 1939); 6A Moore's Federal Practice, ¶ 59.16.

Just recently, in United States v. Fernandez, 506 F. 2d 1200 (1974), this Court reaffirmed this principle. There, the issue was whether the District Court "may change the law of the case as established by this court on the basis of new evidence." (At p.1202.) This Court stated that the District Court "must" proceed in accordance with the mandate and that "compliance with an appellate court's prior rulings in a case is a matter of a trial court's duty, not its discretion." 506 F. 2d 1202-1203.

In this case, the District Court and the magistrate not only evolved a new issue relating to an intention supposedly formed after Jhirad had already left India, but also decided that issue on newly discovered evidence, i.e. evidence which resulted from an additional hearing ordered by the court in express violation of the rule in United States v. Fernandez, supra.

Neither the District Court nor the magistrate cited a single case for the proposition that the statute may be tolled by an intention formed for the first time after an accused leaves the jurisdiction. Even assuming that this novel principle is indeed the law of the United States, it is clearly not the law of the case which was established in this Court's

first opinion. Indeed, implicit in the doctrine of "law of the case" is the possibility that the law applicable to a particular proceeding may, in fact, be "wrong". The policy, nonetheless, is that the law of the case must be applied. Crane Co. v. American Standard, Inc., 490 F. 2d 332, 341 (2d Cir. 1973).

The practical impact of the magistrate's unilateral excursion and the resulting prejudice to Jhirad is apparent. Jhirad returned to the District Court with the assurance that the sole remaining issue was his intent upon leaving India. The District Court first ordered an additional hearing over Jhirad's objection (A74). Jhirad participated in the hearing and was vindicated because of the magistrate's finding that he did not leave India with intent to avoid prosecution. The magistrate then held him for extradition, anyway, based on an issue which Jhirad had no idea whatever that he was contesting.

As to this supposed intent formed subsequently, there is no evidence to support the magistrate's finding that Jhirad formed an intent not to return to India prior to September 25 or 27, 1966 (Point II, infra). In order to force this conclusion, however, the magistrate made assumptions based upon carefully selected portions of Jhirad's own testimony as to his prior practice in his trips abroad, and ignored so much of the evidence relating to such practices as did not support

the desired conclusion. All of this testimony was elicited directly by the magistrate himself from Jhirad when he was a witness on his own behalf. (A 148 - A 149)

Using the word employed by the Supreme Court in In re Sanford Fork & Tool Co., supra, the magistrate "intermeddled" with the direction contained in the opinion of this Court of Appeals. But in so doing, he also applied a new principle without warning to Jhirad and then made a strained inference from Jhirad's own testimony to support a finding of fact justifying the application of the principle.

This approach was not only unfair but it also subverted the policy of repose inherent in the statute of limitations and the liberal interpretation of that policy required by our law and the Treaty.

The only proper action available to the District Court - once it accepted, as it did, the magistrate's finding that Jhirad did not leave India with the intent to avoid prosecution - was to issue the writ of habeas corpus. Its failure to do so should be remedied by this Court, based on the findings of fact made below.

POINT II

THERE IS NO EVIDENCE TO SUPPORT THE MAGISTRATE'S FINDING ON INTENT

The Magistrate, having found that Jhirad did not leave India for the purpose of avoiding prosecution, went on to speculate about his failure to return and held:

> "If he did not return to India when he otherwise would have, so as to avoid prosecution, that would be a constructive flight. The problem is determining when that occurred." (A91)

As indicated earlier, no case was cited below to support the doctrine of "constructive flight". Assuming, however, that such a doctrine may be applied and assuming that it may be applied despite the law of the case, the question arises as to what finding the Magistrate made in this regard and what evidence, if any, there was to support it.

The Magistrate reached the conclusion that Jhirad made his decision not to return to India "in the middle of September 1966, and before the 25th and 27th of that month". (A93) The Magistrate concluded, therefore, that the statute of limitations was tolled with respect to the last two counts of the charges involving 19,000 rupees.

The Magistrate's finding must be set aside as clearly erroneous. F.R.C.P. 52; 5A Moore's Federal Practice ¶52.03[1].

India offered no evidence on the issue. Jhirad testified that he reached the decision not to return to India in November or December 1966 (A146; A151). The Magistrate acknowledged Jhirad's testimony but went on to state "it appears likely that the decision was made somewhat earlier". (emphasis added, A91) Or as the Magistrate put it a second time, it was "more likely than not" that this decision was reached in the middle of September". (A93)

But by what route the Magistrate reached this "likelihood" is obscure indeed. The only testimony which bears even remotely on this issue was elicited from Jhirad by the Magistrate himself:

"BY THE MAGISTRATE:

Q. You spoke of the fact that you attended a number of World Jewish Congresses in earlier years?

A. Yes, sir.

Q. Did you ever take vacations in other countries following these conferences?

A. Yes.

Q. When and where?

A. In 1957 in England and Israel.

Q. Where was the conference?

A. The conference was in London.

Q. And you stopped off in Israel on your way back?

A. Yes. I was in London itself for about two or three weeks and I came -- I went to Israel.

Q. How long did you stay in Israel?

A. I must have been for a week or ten days.

Q. Any other times?

A. I used to go abroad almost every year from 1961.

Q. I mean in connection with these World Jewish Congresses did you take extended vacations following any others?

A. I generally used to combine my vacations with them.

Q. And you would be gone on the average for how long?

A. Well, I should say I would normally go for about a month because I couldn't take more than that time off when I was with Naval Headquarters." (A148;A149)

Apparently the Magistrate reasoned that, since Jhirad had stayed abroad in the past for normally a month, it must necessarily be assumed that he planned to stay abroad for the same period the last time he went abroad, and that when he stayed longer, he did so to flee p[illegible]tion!

Jhirad urges (infra, Point III) that India had the burden of establishing his intent beyond a reasonable doubt. But, even adopting the Magistrate's standard of a preponderance of evidence, this heaping of inference upon inference actually shifted the burden of proof to Jhirad and required him to rebut what is nothing more than a speculation supported by the most tenuous reasoning.

Even so, the speculation was utterly undermined by uncontroverted evidence. As Jhirad stated, on his previous vacations, he had only gone for about a month because he could not take more time off when he was with Naval Headquarters (A 149). Since he was no longer in the naval service, the constraints of prior years did not apply (A 141). The evidence also shows that he had, prior to his departure, obtained visas for France, Germany, Italy and Switzerland, and that he planned to combine his vacation with visits to clients in France and Germany(A146; A147;A150). Obviously, therefore, in view of the change in the circumstances of his employment, there was nothing in his previous practice which would have any bearing on his motives or intent in staying abroad for a longer period than before.

But,even assuming that it might be inferred that Jhirad formed an intention not to return to India prior to November or December 1966, such a finding alone is inadequate to support the conclusion that the statute of limitations was tolled. The court, in addition, was obliged to find that he formed this intention <u>to avoid</u> prosecution

Surely the conclusion that the intention was formed for the purposeof avoiding prosecution must be supported by additional evidence that there was some event which triggered the formation of such an intention. There is not a scintilla

of evidence in the record to support a finding that anything occurred while Jhirad was abroad which prompted him to conclude that he was about to be prosecuted. He testified that he had no knowledge of the prosecution until he was arrested in this country in 1972 (A 89). Equally important, however, the Indian indictments (charge sheets) did not issue until October 1968, two years after the expiration of the statute of limitations; and the Government of India made no move to seek Jhirad's extradition until February 1972, six years after the statute had run. (A25 - 26)

The speculation, therefore, that Jhirad formed the intention not to return to India in the middle of September 1966 in order to avoid prosecution does not even have the benefit of well-reasoned inference. Not only was there no prosecution pending in September 1966; there was no proof of any intervening event in the period July to September 1966 which could have caused Jhirad, though concededly abroad for innocuous reasons, to form an intent not to return home for fear of that non-existent prosecution.

The running of the statute of limitations, therefore, was not tolled.

POINT III

THE GOVERNMENT WAS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT THAT JHIRAD LEFT INDIA WITH THE INTENT TO AVOID PROSECUTION.

Article 5 of the Treaty between the United States and India provides that: "[T]he extradition shall not take place if...exemption from prosecution or judgment has been acquired by lapse of time, according to the laws of [either country]." (A 107)

Thus, extradition is improper if the five year United States statute of limitations has run. See 18 U.S.C. 3282 (Statute of Limitation - Non-Capital Offenses) (A 114); 18 U.S.C. 3290 (Statute of Limitation - Tolling Provision) (A 114). The determination of this issue requires an entirely different burden of proof from that required to establish criminality.

As for the latter, the extradition statute contemplates that the guilt or innocence of the respondent will be determined in the country seeking extradition. 18 U.S.C. 3184 (A 113); Shapiro v. Ferrandina, 478 F. 2d 894 (2d Cir. 1973), cert. den. 414 U.S. 884 (1973).

The statute requires only that the "evidence of criminality" considered in an extradition hearing be "sufficient to sustain the charge". 18 U.S.C. 3184. The government

seeking extradition need only show that there is probable cause to believe that an extraditable crime was committed and that the respondent committed the crime. Merino v. U.S. Marshal, 326 F. 2d 5 (9th Cir. 1963), cert. den. 377 U.S. 977 (1964).

However, as the magistrate found, with regard to whether extradition is time-barred under the United States standard, 18 U.S.C. 3282, "this is not an issue which will be ultimately considered in India." (Emphasis added.) (A 89)

Even if Jhirad were to have the benefit of the statute of limitations of India at a trial in that country, the Treaty demands that he have the benefit of the United States statute prior to extradition. The application of that statute does not relate to criminality. Rather, it relates to jurisdiction, i.e. whether he can be extradited in the first place.

The magistrate found that:

> "[I]f this were a domestic prosecution the burden would be on the government to establish beyond a reasonable doubt that the statute of limitations was tolled. People v. Kohut, 30 N.Y. 2d 183, 331 N.Y.S.2d 416, 282 N.E.2d 312 (1972)....If, in fact, India must prove, beyond a reasonable doubt, flight to avoid prosecution before the expiration of the period of limitations, then it is clear that India has failed in that regard." (Emphasis added.) (A 89 - 90)

India was required to establish intention to flee by proof beyond a reasonable doubt. Buhler v. United States, 33 F. 2d 382 (9th Cir. 1929); and see United States v. Belimex Corp., 340 F. Supp. 466, 468-469 (S.D.N.Y. 1971); Donnell v. United States, 229 F. 2d 560 (5th Cir. 1956); Din v. United States, 232 F. 2d 283 (9th Cir. 1956), cert. den. 352 U.S. 827; Brouse v. United States, 68 F. 2d 294 (1st Cir. 1933).

Yet because the inquiry into Jhirad's intent arose in an international extradition proceeding, the magistrate and the District Court declined to apply the reasonable doubt standard (A90; A102-A103).*

Both the magistrate and the District Court missed the point. Since the Treaty incorporates a domestic standard as a threshold issue to be resolved prior to extradition, Jhirad was entitled not only to the substantive rules relating to that standard but to the procedural rules as well.

A determination of Jhirad's intent by a lower standard than that which would be required in a domestic criminal trial is a denial, therefore, of the due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution. U.S. Const. Amend. 5 and 14.

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* The magistrate went on to apply a preponderance of the evidence test (A90), was apparently forced to conclude that India had failed to meet even that burden (A90, 91), and finally concluded that Jhirad's failure to return to India by September 1966 constituted a "constructive leaving" - a doctrine unknown to this body of law, for which the magistrate cited no authority.

Indeed, in Speiser v. Randall, 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958), the Court said:

> "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. Cities Service Oil Co. v. Dunlop, 308 U.S. 208, 84 L.Ed. 196, 60 S.Ct. 201....There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value - as a criminal defendant his liberty - this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Tot v. United States, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241, supra." (Emphasis added.) 357 U.S. 525-526, 2 L. Ed. 2d 1472-1473.

See also In re Winship, 397 U.S. 358, 361-364, 25 L. Ed. 2d 368, 373-375, 90 S. Ct. 1068 (1970); Mullaney v. Wilbur, 44 L. Ed. 2d 508, 518-522 (1975).

The rationale of these cases requires an analysis which looks to the substance of the interest at stake in the allocation and quantum of burden of proof. See Mullaney v. Wilbur, supra, 44 L. Ed. 2d at 519-520. And, under the equal protection clause of the Fourteenth Amendment, Jhirad would have to be shown to be rationally distinguishable from a domestic criminal defendant.

In fact, the "reasonable doubt" standard was rejected below because of the form of the proceeding, the novelty of Jhirad's assertion and, impliedly, for the convenience of the Government of India. (A89 to A90; A102)

In the light of the consequences of the lesser standard - Jhirad's inability ever to contradict the evidence offered by the Government of India on the statute-of-limitations issue - these considerations are constitutionally inadequate.

The Treaty and the Constitution require that domestic standards relating to the statute of limitations and its tolling provision be applied. 18 U.S.C. 3282; 18 U.S.C. 3290. The magistrate found that the domestic standard was proof beyond a reasonable doubt. (A89 to A90) Since India failed to prove beyond a reasonable doubt that Jhirad left India with the intent to avoid prosecution, Jhirad should be discharged from custody. (A90)

POINT IV

THE DENIAL OF A FAIR HEARING TO JHIRAD ON THE ISSUE OF WHETHER HE LEFT INDIA WITH THE INTENT TO AVOID PROSECUTION AMOUNTED TO A DENIAL OF THE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE CONSTITUTION.

Review by habeas corpus in an international extradition proceeding raises primarily questions of jurisdiction. Shapiro v. Ferrandina, supra, 478 F. 2d, at 901; Garcia-Guillern v. United States, 450 F. 2d 1189, 1191 (5th Cir. 1971), cert. den. 405 U.S. 989 (1972); Fernandez v. Phillips, 268 U.S. 311, 45 S. Ct. 541, 69 L. Ed. 970 (1925); Jimenez v. Aristeguieta, 311 F. 2d 547 (5th Cir. 1962); Wacker v. Bisson, 348 F. 2d 602 (5th Cir. 1965).

This Court's remand for the purpose of requiring the District Court "to make findings on the issue of intent" posed a jurisdictional question only (A69). The District Court lacks the power to cause the extradition of Jhirad despite a finding of probable cause if the United States statute of limitations has run. 18 U.S.C. 3282. (A14-15) Jhirad's resort to habeas corpus, therefore, was no different from the reliance on the writ in any other proceeding. The right to hold him in custody was being tested; and he was entitled to the same fair hearing which must obtain in any such proceeding. The denial to Jhirad of a fair hearing amounted to a denial of due process of law and a denial of the equal protection of

the laws guaranteed by the Constitution. See generally, Note, "Developments in the Law - Federal Habeas Corpus", 83 Harv. L. Rev. 1038 (1970).

First, Jhirad was entitled to pre-trial discovery under the guidelines of Harris v. Nelson, 394 U.S. 286, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969), reh. den. 394 U.S. 1025, 23 L. Ed. 2d 50, 89 S. Ct. 1623 (1969).

In that case, the Supreme Court declared that a district court, when "confronted by a petition for habeas corpus which establishes a prima facie case for relief", may "authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to 'dispose of the matter as law and justice require.' 28 U.S.C. § 2243." 394 U.S. 290, 22 L. Ed. 2d 285-286.

The Court's limitations on the use of discovery in habeas proceedings, designed to avoid abuse by incarcerated petitioners, are inapplicable here. 394 U.S. 297, 22 L. Ed. 2d 290. In fact, here, it was the District Court which insisted on an evidentiary hearing (A74).

The court in Harris recognized that:

> "[p]etitioners in habeas corpus proceedings, as the Congress and this Court have emphasized, and as we have discussed...are

> entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts...[Thus] [f]lexible provision is made for taking evidence by oral testimony, by deposition, or upon affidavit and written interrogatory. 28 USC § 2246. Cf. §§ 2245, 2254(e)...Clearly, [as to discovery] in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 USC § 1651." (emphasis added) 394 U.S. 298-299, 29 L. Ed. 290-291.

A district court has the duty and the power,

> "[a]t any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly 'dispose of the matter as law and justice require,' either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be 'necessary or appropriate in aid of [its jurisdiction]... and agreeable to the usages and principles of law.' 28 U.S.C. § 1651." 394 U.S. 300, 22 L. Ed. 2d 291.

Harris authorizes a case-by-case approach to habeas hearings. See Troglin v. Clanon, 378 F.Supp. 273, 280 (N.D. Calif. 1974). And this Court has utilized that authority, noting, "Harris confirms the power of the judiciary, under the All Writs Act, 28 U.S.C. § 1651 (1970), to fashion for habeas actions 'appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with

judicial usage.' 394 U.S. at 299, 89 S.Ct. at 1090." United States ex. rel. Sero v. Preiser, 506 F. 2d 1115 at 1125 (2d Cir. 1974), cert. den. 95 S. Ct. 1587 (1975).

The District Court, however, mistakenly described the nature of this proceeding, ignored the mandate of Harris, and refused to permit discovery (A75 to A78).

The District Court declined to issue any discovery order whatsoever - not as a matter of an informed discretion but solely because it confused the purpose of this hearing with that of the preliminary extradition hearing, where the magistrate's role is merely to determine whether there is probable cause tohold the accused for trial. See 18 U.S.C. 3184 (A 113). Extended discovery at those extradition proceedings is traditionally banned because it is anticipated that a full trial on the merits will take place in the country where the alleged crime was committed (A75).

The issue of probable cause in Jhirad's case was not the subject of the Court of Appeals' remand. (A69) The magistrate was in no way being asked to "determine whether there is competent evidence to justify holding the accused to await trial...'" (A75), citing Collins v. Loisel, 259 U.S. 309, 316, 42 S. Ct. 469, 66 L. Ed. 956 (1922). The fact to be determined - Jhirad's intent - would resolve whether the court had jurisdiction at the time the magistrate did hear evidence of probable cause.

The issue of Jhirad's intent in leaving India will never receive a "full trial" in India. It has no legal relationship to his guilt or innocence vis-a-vis the Indian crime charged. It is a threshold question, a question that could be posed only in a habeas corpus proceeding in the United States and whose answer has relevance only to that habeas corpus proceeding.

The District Court's view would nullify the availability of habeas corpus in all international extradition proceedings. Although the statute makes habeas available in such proceedings, and the cases uniformly hold it is proper to test jurisdictional issues by that route, the District Court's holding below would deny a petitioner any of the procedural rights which attach to the writ because they conflict with "traditional extradition standards." (A78) See 28 U.S.C. 2241(c)(4); Fernandez v. Phillips, supra.

Jhirad, in fact, had extraordinary difficulty in preparing his defense because of the lapse of time since his departure from India and the distance from that country. Since the District Court declined to issue any discovery order, Jhirad could not adequately prepare or present his case. That denial by the District Court deprived Jhirad of due process of law and protection of the law equal to that afforded other habeas petitioners.

Jhirad was also denied a fair hearing because the only evidence which was offered by the Government of India

on January 30, 1974 consisted of documents which were inadmissible hearsay

Again, the remand "to make findings on the issue of [Jhirad's] intent" when he left India, was made to resolve a jurisdictional issue which arose in a habeas corpus proceeding. In the light of the nature of the proceeding, evidence presented by the Government of India violated the standards set down in the applicable statute, 28 U.S.C. 2246.

The Government relied on depositions (called "statements") (A142-A145) which were taken in India. The deponents did not appear at the hearing in the United States. These depositions were improperly admitted because ex parte depositions are not permitted under 28 U.S.C. 2246 and Jhirad was not present at the time the statements were taken. See Knowles v. Gladden, 254 F. Supp. 643 (D.Or. 1965). (A 116)

Certain so-called affidavits were also placed in evidence. Use of affidavits is within the discretion of the trial judge under 28 U.S.C. 2246. However, "[i]f affidavits are admitted any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits..." 28 U.S.C. 2246. This right was denied Jhirad.

Furthermore, despite the statutory provisions for the taking of evidence by affidavit, it has been held that

"such a procedure cannot be used to resolve substantial disputed questions of fact. Copenhaver v. Bennett, 355 F. 2d 417, 421 (8th Cir. 1966)." Campbell v. State of Minnesota, 487 F. 2d 1, 4, footnote 3 (8th Cir. 1973).

Here, the only issue under examination was resolved by ex parte affidavit and Jhirad's testimony.

In fact, all of the documents placed in evidence by the Government of India were hearsay. Since habeas corpus proceedings must comply with Federal evidentiary rules, these documents were inadmissible unless they came within some exception to the general proscription against the admissibility of hearsay. See Procello v. Beto, 319 F. Supp. 662 (D.Tex. 1970); Rule 1101(e), Federal Rules of Evidence. No attempt was made to identify or comply with any relevant exception (A 142 - A 145).

For all of these reasons, Jhirad was denied a fair hearing on the jurisdictional issue of his intent in leaving India. That denial amounted to a deprivation of that due process and equal protection of the laws which is guaranteed by the Constitution.

POINT V

JHIRAD WAS IRREVOCABLY PREJUDICED BY THE DISTRICT COURT'S DELAY.

Jhirad's third application to the District Court for a writ of habeas corpus challenged the magistrate's finding tolling the statute of limitations. More than fourteen months after the application was made, the District Court - relying wholly on the magistrate's findings - ruled that the statute had been tolled, and that two charges for crimes which allegedly occurred in 1961 were not time-barred. (A94 to A103)

The District Court's delay, given the issue at stake, was more than merely ironic. The passage of these additional fourteen months, significantly compounds Jhirad's difficulty in preparing an adequate defense to the charges pending in India. The prejudice to him is so severe as to amount to reversible error.

If Jhirad faced a domestic criminal trial, such a fourteen-month pause in the proceedings, in the light of the difficulty of defending against charges already remote, would probably amount to no less than a denial of Jhirad's Sixth Amendment right to a speedy trial. See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); United States v. Marion, 404 U.S. 307, 30 L. Ed. 2 468, 92 S. Ct. 455 (1971), concurring opinion by Justice Douglas.

It has been held, for example, that a four-year delay between the commission of a crime and the defendant's trial is presumptively prejudicial. United States ex rel. Little v. Twomey, 477 F. 2d 767 (7th Cir. 1973), cert. den. 94 S. Ct. 112. The remedy for a two-year delay in sentencing, which resulted in demonstrable prejudice to the defendant, was to vacate the sentence and release the defendant from custody. Juarez-Casares v. United States, 496 F. 2d 190 (5th Cir. 1974).

The Sixth Amendment right to a speedy trial "protects several demands of criminal justice: the prevention of undue delay and oppressive incarceration prior to trial; the reduction of anxiety and concern accompanying public accusation; and limiting the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Marion, supra, concurring opinion 404 U.S., at 330, 30 L. Ed. 2d, at 484.

These considerations apply with equal force in Jhirad's case, where the expiration of the statute of limitations is now the central issue.

The statute, whose policy is "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time....", in fact, serves the same purpose as the Sixth Amendment. Toussie v. United States, supra.

The District Court attempted to excuse itself by asserting it had "spent an enormous amount of time in reviewing and rereviewing the extensive record in this case". (A99) In fact, the record of the proceedings of the remand consisted of a transcript of some 141 pages. And the opinion rendered is in large measure an almost verbatim restatement of the magistrate's findings and conclusions.

Mr. Justice Brennan, in his concurring opinion in Dickey v. Florida, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970), asked and answered a question which is appropriate, by analogy, for Jhirad's case:

> "When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable....The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided - whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interest protected by the speedy-trial safeguard. For a trivial

> objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect." 398 U.S., at 51-52, 26 L. Ed. 2d, at 40.

Here, in the light of the increasing remoteness of the events of 1961, the District Court's fourteen-month delay in rendering its decision on the tolling of the statute of limitations was not merely "suspect" but amounted to reversible error.

POINT VI

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE WITH RESPECT TO AN ESSENTIAL ELEMENT OF THE CRIMINAL CHARGE AGAINST JHIRAD.

As previously stated, the first appeal did not reach the issue of probable cause because of this Court's remand on the threshold, jurisdictional issue of the limitations statute. As a consequence, the issue is here again for review.

While it was not the purpose of the original extradition hearing to determine whether the accused was innocent or guilty, the Government of India was burdened with the obligation to make out a prima facie case. Collins v. Loisel, 259 U.S. 209 (1922); Charlton v. Kelly, 229 U.S. 447 (1913); First Nat. City Bank v. Aristeguieta, 287 F. 2d 219 (2d Cir. 1960). It was required to produce some substantial evidence on each element of the crime of embezzlement. As the court said in Collins v. Loisel, supra, at page 317, the evidence to support a finding of probable cause must be sufficient "to block out those elements essential to a conviction."

If India's evidence supported some, but not all, of the elements of the crime of embezzlement, then it failed to make a prima facie case.

In substance, India charged that Jhirad made cash withdrawals from the Naval Prize Fund and deposited some of the funds in his personal bank account. It also charged, in

the words of its own "charge sheets", that.

> "Some of the Naval personnel who were entitled to a share of Prize Money have on being examined, stated that they did not receive their share of Prize Money." (A 152)

The magistrate found that this allegation had not been proven:

> "India attempted to prove that a number of former seamen who were entitled to participate in the Fund were not in fact paid. Their evidence was insufficient in that, although they showed that these persons were entitled to file claims against the Fund, there was no proof that they had in fact filed timely claims." (A27)

Since the charge sheets, which are concededly India's equivalent of an indictment, contained an allegation which was not proven, it necessarily follows that India has failed to "block out" one of the elements essential to a conviction. Both the magistrate and the District Court concluded that it was not necessary for India to sustain this allegation in its charge sheets. However, there is no testimony or rule of law - and none has been cited by the courts below - which establishes that this allegation in the charge sheets is surplusage.

On the contrary, every indication in the record is that the elements of an embezzlement under Indian law are identical to those required in the United States. (A11-14;A117-118; A119-120) There is no question, of course, that, in American law, there can be no embezzlement absent a true owner actually deprived of his money. 29A C.J.S., Embezzlement, § 11. Thus, the allegation that claimants

had been deprived of their portion of the Fund (or something equivalent to it) is indeed an essential allegation in the charge sheets. The magistrate's finding that there was "no proof" that a true owner had been so deprived mandates a finding that India has not established probable cause.

The American authorities are settled beyond cavil on this point. An essential element of the crime of embezzlement is the conversion or appropriation of the property of another. As explained in 29A C.J.S., Embezzlement, §11(b):

> "To constitute conversion so as to make out a case of embezzlement, there must be an unauthorized assumption and exercise of the right of ownership to the exclusion of the owner's right or the other must be actually deprived of his property or money by an adverse using or holding...."

The indictment must set down both the name of the person to whom the property belongs and the fact of his ownership. 26 Am. Jur. 2d, Embezzlement §39; People v. Cohen, 352 Ill. 380, 182 N.E. 608 (1933). Even when the charge is against a public officer distributing funds belonging to others, it must be shown that the true owner has been deprived of his property. 29A C.J.S., Embezzlement, §11(e); People v. Reynolds, 214 App. Div. 21 (2d Dept. 1925), at p. 34-35.

There is a fundamental policy issue here - applicable equally to Indian and to American law - both descended, as they are, from the English common law. The Government must allege

and establish the identity of the true owner of the property and his loss or deprivation of property - not only to establish that the property is, in fact, missing but also to insure that the accused will not be subject to double jeopardy. 26 Am. Jur. 2d, Embezzlement, §39, at p. 592. In the United States, of course, this is a matter of constitutional import; and, surely, the same is true in India. (A 119 - 120).

India, therefore, felt itself obliged to allege in its charge sheets that some claimants had been deprived of their share of the Fund in order to establish that there was, in fact, a loss by the true owner of his property or, stated another way, that the money was missing, or improperly diverted.

The magistrate clearly appreciated the need to meet this requirement. Having held flatly that India's evidence was"insufficient" in this regard, he went on to speculate that depriving the true owners of the Fund of their portion was not the only way to tap it. The magistrate said:

> "Other ways in which funds could have been embezzled were by enlarging the number of claimants by adding fictitious names, by miscomputing the amount to be paid to proper claimants, or by appropriating unclaimed funds when claimants had died or disappeared following a submission of their claims. Other ways of tapping the Fund surely exist, so it certainly is not necessary to show that the monies were taken from persons who had filed proper and timely claims..." [emphasis added](A27 to A28)

The key to the magistrate's discussion is his complete reliance upon other ways in which the Fund "could have been embezzled" because it demonstrates that there was no proof at all of such embezzlements.

Assuredly, schemes that might have been employed to embezzle from this Fund were myriad; but, just as assuredly, it is India's obligation to establish probable cause that one such scheme was, in fact, employed in this case. The Magistrate's speculation as to the ways the Fund "could have been embezzled" demonstrate more eloquently than the evidence itself India's failure to present evidence of any such scheme. The prima facie case as to the one scheme upon which India attempted to rely (i.e., the failure to pay an eligible claimant) was, as the magistrate held, "insufficient" because "there was no proof...." (A27)

The reason India is obliged to establish some such scheme or technique, once again, is dictated by its obligation to show that a true owner of the Fund has been deprived of his share or that a portion of the Fund is missing. Any of the devices cited by the magistrate - creating fictitious claims, miscomputation of the amount to be paid, misappropriation of of unclaimed funds - would have had the ultimate effect of depriving a true owner of his proper portion of the Fund.

Both India - by its attempt to establish unpaid claimants - and the magistrate - by his reliance upon other techniques which might have been employed - unmistakably demonstrate the incurable deficiency in India's case: the failure to present some substantial proof that any portion of the Fund is missing or that a proper and timely claimant has been deprived of his share.

On this issue, the District Court held:

> "It is not necessary that an individual unpaid claimant be brought forth since there was evidence presented which demonstrates that the money was not Jhirad's. If the money did not belong to a claimant, then it must revert back to the authorizing unit, certainly not to the fiduciary who administered it." (A55)

This holding misconstrues not only the requirements of the law but the nature of the Fund as well. It was, by India's own explanation, a non-public fund and belonged to a finite class of persons who met the requirements of the Joint Proclamation which established it. (Exhibit 8, Indian Government Document PW 11/1 on Case 34/2) That class consisted of those persons who had seen the required service at sea during the Second World War and had filed a timely claim. (A 152) The latter requirement was indispensable, both according to the Proclamation itself and to the proper distribution of the Fund since the Joint Proclamation

did not itself fix the amount to which each eligible person was entitled. It merely prescribed proportional shares according to rank. The actual sum to be distributed could be fixed only by determining the total number of eligible persons, assigning to them their appropriate shares, and finally, dividing the total number of shares into the total amount of the Fund.

Thus the distribution of the Fund was governed by rules which would automatically exhaust it, for the amount each individual claimant would receive would be higher or lower depending upon the number of eligible claimants who filed timely claims prior to distribution. There was to be no reversion.

The magistrate understood this and, for this reason, his speculations as to the schemes by which the money "could have been embezzled" require either the falsification of the number of claimants or the appropriation of funds of eligible claimants who for one reason or another had not received their share. But he also found "no proof" of any such scheme.

It is clear, therefore, that an essential element of the Indian charges has not been proven, for no other scheme for tapping the Fund was alleged by India nor was

proof of any other such scheme submitted to the magistrate.

But even the evidence relied upon by India and the court below to connect Jhirad with the unproven charge is insufficient. The evidence submitted by India in support of the charge that "the accused, having withdrawn large amounts in cash from the Naval Prize Fund...deposited various amounts in his personal account...." (A 152) is, with respect to the two remaining counts of embezzlement, at best, inconclusive.

At the original extradition hearing, the Government of India attempted to rely upon a purported course of conduct relating to the 52 separate charges on India's three charge sheets. Since 50 of these charges have now been found by the District Court to be barred by the statute of limitations, it is patently unfair for the "evidence" in support of the time-barred charges to be used in support of the last two remaining charges. Indeed, the District Court specifically found that, under Indian law, each separate offense must be considered on its own merits. (A59 - A60) But even assuming the court could rely on a purported "course of conduct", the evidence is insufficient.

India presented no independent evidence whatever, on the last two charges, that the deposits made in Jhirad's

personal account were the same, or portions of the same, moneys withdrawn by him from the Naval Prize Fund.

Moreover, the crime of embezzlement can only occur when the accused in the first instance has possession, dominion and control of the fund under a legitimate claim of right. Therefore, it has been held, the mere exercise of dominion (such as placing trust funds in one's own account) is not in itself a crime. Tinsley v. Bauer, 271 P. 2d 110 (Calif. 1954), Parnell v. State, 339 So. West 2d 49 (Texas Court of Criminal Appeal 1959); People v. Von Cseh, 9 A.D. 2d 660, N.Y. App. Div. (1st Dept. 1959).

The salutary purpose of such a rule is obvious from the evidence given in this case. Jhirad stated that much of the Fund was distributed by means of postal money orders. (A 140) This is confirmed by the Government's witnesses, Jetha Nand (A 124)and Bhardwaj (Exhibit 6, at p.7); and by the statement of a co-administrator of the Fund, Mr. Sharma (Exhibit G). Jhirad testified that frequently cash was used to pay for the money orders. (A 140) This is likewise confirmed by the Government's witnesses, Jetha Nand (A125)and Bhardwaj (Exhibit , at p. 9); and by Sharma (Exhibit G). Jhirad further testified that from time to time he advanced cash for the purchase of money orders (A140); and this is also confirmed by the Government's

Bhardwaj (Exhibit 6, at p. 9).

Jhirad testified that because of the burdens of administering the Fund, he had sometimes advanced his own cash for the purchase of money orders and then reimbursed himself with checks payable to cash drawn on the Prize Fund account. (A29 - A30) The magistrate found that this action was "extremely unwise". (A33) Lack of wisdom, however, is not a crime; nor should criminal intent be inferred from it, particularly where the magistrate's judgment surely must have been colored by the American custom in this regard where checks, unlike in India, have practically replaced cash for larger transactions. (A 139)

Furthermore, Jhirad established without contradiction that he had considerable personal cash resources. As Judge Advocate General, he was a civilian employee with the right of private practice as an attorney. He received many of his fees in cash and, in addition, received cash income from securities transactions. (A 139)

Jhirad's testimony in this regard is completely consistent with India's evidence. Since the evidence of deposits in his own account does not in itself establish a prima facie case (Tinsley v. Bauer, Parnell v. State, People v. Von Cseh, supra), the evidence offered by Jhirad simply eliminates any lingering doubt that may yet have

have existed in that regard. It establishes affirmatively what is already implicit in the evidence proffered by India: (1) that Jhirad sometimes sought reimbursement after advancing his cash for the purchase of money orders and (2) that he had ample cash available in his office from other sources for making such advances.

Apart from Jhirad's explanation, the facts relating to the two offenses which the District Court held not barred by the statute of limitations do not in any respect support the inferences which the Government of India attempts to draw from them. The third charge sheet (A 152) consists of four charges. The first two charges are now barred by the five-year statute of limitations. With respect to the remaining two, in each case the amount with which Jhirad is charged (i.e., the amount deposited in his account) is substantially smaller than the cash withdrawn from the Naval Prize Fund. The total withdrawn from the Fund was 40,000 rupees. The total deposited in Jhirad's account was only 19,000. (A 152)

Furthermore, as appears from Exhibit 15, there were cash withdrawals from the Naval Prize Fund during this period with which Jhirad is not charged, as follows:

Aug. 23, 1961	1,000 rupees
Sept. 30, 1961	6,000 "
Oct. 4, 1961	5,000 "
TOTAL:	12,000 rupees

In addition, as appears from Exhibit 14, there were deposits of cash in Jhirad's account during the same period with which he is likewise not charged as follows:

July 25, 1961	10,000 rupees
July 26, 1961	20,000 "
Aug. 29, 1961	6,000 "
Sept. 5, 1961	500 "
TOTAL:	36,500 rupees

Again from Exhibit 14, it appears that Jhirad made substantial cash deposits after the alleged period of the offenses as follows:

Sept. 26, 1961	14,000 rupees
Sept. 27, 1961	5,000 "
March 16, 1962	20,000 "
March 17, 1962	20,000 "
Aug. 4, 1962	3,000 "
Aug. 24, 1962	2,500 "
Aug. 25, 1962	500 "
TOTAL	65,000 rupees

These later deposits establish that, long after the last offense charged was alleged to have been committed, Jhird continued to have substantial cash income.

India, apparently, appreciated the weakness of its position in this respect for it included in the allegations in its charge sheets that:

> "The investigation has further revealed that there were no withdrawals from the personal accounts of the accused for making the deposits mentioned...above."
> (A 152)

India clearly felt obliged to demonstrate that Jhirad could not account for the deposits in his own account with withdrawals from his other accounts. At the hearing, Jhirad's counsel demanded that India furnish copies of these other accounts (A 126 -A128); but India was unable to do so. Inexplicably, the magistrate rejected evidence offered by Jhirad which would have established substantial cash profits in a commodity brokerage account. (A30) The District Court held that "the Magistrate may have erred in disregarding the evidence" (A57), but held that the error was not fatal. This error, however, when compounded with the refusal of the Government of India to furnish Jhirad's other bank accounts, is fatal to India's claim that there could have been no source for the cash deposits in Jhirad's account other than the Naval Prize Fund. Plainly, that was not the case at all.

All of the foregoing, taken together, establishes the entirely coincidental nature of the withdrawals and deposits which are the subject of the two charges the

the District Court held not barred by the statute of limitations and reinforces the rationale of the rule that, without a showing that any money is missing, evidence of deposits in the accused's bank account is utterly irrelevant to a charge of embezzlement. Parnell v. State, Tinsley v. Bauer, People v. Von Csch, supra.

Moreover, absent some substantial proof in the record that either some portion of the Fund is missing or that a rightful owner has been deprived of his share, India has failed to establish probable cause sufficient to hold Jhirad for extradition. The fact of the matter is that, on this record, there simply are no substantial grounds to believe any crime at all has been committed.

POINT VII

THE EVIDENCE ESTABLISHED THAT JHIRAD WAS BEING SOUGHT BY THE GOVERNMENT OF INDIA SO AS TO PUNISH HIM FOR PRO-ISRAEL POLITICAL ACTIVITY.

As with the probable cause issue, the political motivation issue was raised by Jhirad but not reached by this Court on the first appeal. The issue is again before the Court, for the Treaty (Article VI) relied upon by India provides:

> "A fugitive criminal shall not be surrendered if the crime or offense in respect of which his surrender is demanded is one of a political character or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character." (A107)

The District Court correctly concluded that Article VI sets forth "two separate tests"; and the court held that:

> "A fair reading of the Treaty compels the conclusion that this Treaty creates a prohibition against politically motivated extradition, and therefore the Magistrate properly allowed evidence to be presented on this issue." (A50)

The magistrate found that Jhirad was an "outspoken apostle of the cause of the new nation of Israel" which was "unpopular" since India "is aligned with the Arab bloc of

nations" (A39), a rather startling understatement of the case, given the passions aroused all over the Moslem world by the Arab-Israeli conflict.

Nonetheless, the magistrate found no political motivation in India's actions against Jhirad (A40), even though the uncontradicted evidence showed that Jhirad was under surveillance by the Special Police Establishment because of his public pro-Israel activity, that his telephone was tapped, his mail was opened, and that he had been chastized by the Defense Minister, Krishna Menon, for having negotiated a pro-Israeli International Convention on the law of the sea (A 129, A 130 - 131, A 133, A 135).

These elements, coupled with the extraordinarily flimsy case brought against Jhirad, the length of time it has taken India to put it together, the amount of money it has obviously spent, and its continued pursuit of Jhirad even after 50 of the 52 charges against him have been time-barred, leads inevitably to the conclusion that India's requisition for Jhirad's surrender has, in fact, been made with a view to punish him for an offense of political character and not for the crime of embezzlement as set forth in the charge sheets.

The Government of India produced not a single shred of evidence to contradict this evidence; nor did it in any way attempt to challenge the necessary inferences which must

be drawn therefrom, despite the fact that India has known since Jhirad's bail hearing over three years ago that such a defense would be raised.

It is also noteworthy that India has apparently not sought to bring Admiral Katari or P.L. Sharma to trial, despite the fact that they were co-administrators of the Prize Fund with Jhirad. Sharma actually handled a good many of the checks which India relies upon as proof of Jhirad's alleged misappropriation; yet Sharma remains at work in the Indian Naval Law Directorate. (A 123)

The magistrate was troubled by the fact that, at the same time India's Special Police Establishment was investigating Jhirad's activities to the point of open harassment, other branches of the Government were bestowing honors upon him; and the magistrate concluded that this evidence negated the evidence tending to show political motivation. The magistrate's reasoning is a non sequitur for, as the magistrate himself recognized, this may well have been "one of these not infrequent incidents of one branch of the Government not being aware of what another branch of the Government is doing." Indeed, the evidence of both the Government of India and of Jhirad was consistent in establishing that, while the Navy and the Judiciary appeared to hold Jhirad in the highest esteem,* the Special Police

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* For example, despite the serious charges leveled by the Special Police Establishment, the Navy never held a Board of Inquiry (A 121 - 122).

Establishment and the pro-Arab members of the Government were making a concerted - and unsuccessful - attempt to destroy Jhirad's reputation and career.

When one views the case of the Government of India as a whole, particularly in the light of the enormous effort and expense to which it has gone and the length of time which has passed since the investigation began, and one considers how remarkably sparse that case is, there can be little doubt that the motivation of the Government of India derives from some far darker source than the supposed loss of a few thousand rupees. The charge is embezzlement from a Naval Prize Fund; yet the case was begun not by the Navy but by the Special Police Establishment; the case was presented to the magistrate in India by the Special Police Establishment; the chief witness before the magistrate in the United States District Court was from the Special Police Establishment; and it is clearly the Special Police Establishment and not the Indian Navy that wishes to return Jhirad to India.

Indeed, the sheer implausibility of India's case simply boggles the imagination. What India alleges, on the 52 counts in its charge sheets, is that Jhirad embezzled well over 40 percent of the Fund. And yet - in a country of such grinding poverty that 100 rupees may be a year's income - there is <u>no</u> evidence of any complaint being made by any claimant until nine years after the Joint Proclamation was

issued, when a sailor named A. C. John wrote to the Navy that he'd like a share despite the fact that he never filed a claim (Exhibit 9, at p. 42). The Government of India has apparently been unable to locate a single eligible sailor who did not receive his share of the Fund. The only witness India produced at the extradition hearing was not from the Navy at all but from - of course - the Special Police Establishment.

No government, and particularly not one which in the recent past has considered itself the Third World spokesman for international morality, is going to wear its heart on its sleeve with regard to its true motivation in singling out Jhirad for an extradition effort that has stretched across three oceans and a decade of time. Jhirad's case on this issue must of necessity be inferential to some extent. But only one inference can be drawn from India's failure to present any evidence on this issue at all: India has admitted Jhirad's charge of political motivation.

Moreover, this Court can hardly close its eyes to the fact that, on October 10, 1975, India voted in the United Nations in favor of the resolution equating Zionism with racism - a blatantly anti-Semitic act and designed, in part, to question Israel's right to existence. Nor should this Court overlook the overwhelming evidence that India, in this past year, has virtually become a dictatorship, with the bulk of its tradition political opposition leadership behind prison walls.

Under these circumstances, Jhirad, a citizen of Israel to this day (though now a permanent resident of the United States), will have little chance of obtaining a fair trial in India. Indeed, the very fact that the Special Police Establishment - after ten years of effort and expense - is still seeking Jhirad's return for a trial on charges limited (theoretically) by the Treaty to $1,609 is perhaps the most practical demonstration that it is not a claimed embezzlement which stands behind India's request for extradition.

This Court has no reason to assume that the Government of India, in pursuing Jhirad half way around the world for a decade, has been acting frivolously. Since the charges for which Jhirad may be extradited are now frivolous - and yet India's pursuit continues - there can hardly be any doubt that political retribution is the real reason behind India's request.

On that ground, the Treaty itself bars extradition. (A 107); and the writ should issue.

CONCLUSION

The writ of habeas corpus should be granted by this Court. 28 U.S.C.A. § 2241.

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Respectfully submitted,

TENZER, GREENBLATT, FALLON & KAPLAN
Attorneys for Appellant Elijah
Ephraim Jhirad

EDWARD L. SADOWSKY
STACY L. WALLACH
MONA D. SHAPIRO,

Of Counsel